TELECOMMUNICATIONS/State-Local Telecommunications Barriers

SUBJECT: **Telecommunications Competition and Deregulation Act of 1995 . . . S. 652. Feinstein/Kempthorne amendment No. 1270.**

ACTION: AMENDMENT REJECTED, 44-56

SYNOPSIS: As reported, S. 652, the Telecommunications Competition and Deregulation Act of 1995, will amend telecommunications laws and reduce regulations in order to promote competition in the telecommunications industry by eliminating barriers that prevent telephone companies, cable companies, and broadcasters from entering one another's markets. It will also permit electric utilities to enter the cable and telephone markets. Judicial control of telecommunications policy, including the "Modified Final Judgment" regime, will be terminated.

The Feinstein amendment would strike the proposal to add section 254(d) to the Cable Act. That section will give the Federal Communications Commission (FCC) the right to preempt State and local government statutes, regulations, or legal requirements that prohibit any entity from providing any interstate or intrastate telecommunications service. Preemption will only be to the extent necessary to remove barriers. As provided in section 254(b), preemption will not apply to State requirements that are imposed on a competitively neutral basis and that are necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, or safeguard the rights of consumers. As provided in section 254(c), preemption also will not apply to local governments rules to manage public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way, if such compensation is publicly disclosed. Appeals by State and local governments of FCC decisions will be in the Federal District Court in Washington, D.C.

NOTE: Following the vote, the Senate agreed by voice vote to a pending Gorton first-degree amendment to the language proposed to be stricken by the Feinstein/Kempthorne amendment. The Gorton amendment would make two changes to the preemption language. First, it would strike the FCC's right to preempt a statute, regulation, or legal requirement that is "inconsistent" with the restrictions on barriers to providing telecommunications services (but it would still allow it to strike requirements that violated the restrictions). Second, it would not permit the FCC to preempt a local government action under section 254(c), as described above.

(See other side)

YEAS (44)

Republicans (16 or 30%)	Democrats (28 or 61%)
Abraham	Akaka
Bond	Baucus
Burns	Biden
Campbell	Bingaman
Cohen	Boxer
DeWine	Bradley
Faircloth	Byrd
Hatfield	Conrad
Hutchison	Dodd
Inhofe	Feingold
Kempthorne	Feinstein
Mack	Ford
McCain	Glenn
Roth	Graham
Simpson	Kennedy
Thomas	Kerry
	Kohl
	Lautenberg
	Leahy
	Levin
	Mikulski
	Moseley-Braun
	Murray
	Pell
	Pryor
	Robb
	Sarbanes
	Wellstone

NAYS (56)

Republicans (38 or 70%)		Democrats (18 or 39%)
Ashcroft	Jeffords	Breaux
Bennett	Kassebaum	Bryan
Brown	Kyl	Bumpers
Chafee	Lott	Daschle
Coats	Lugar	Dorgan
Cochran	McConnell	Exon
Coverdell	Murkowski	Harkin
Craig	Nickles	Heflin
D'Amato	Packwood	Hollings
Dole	Pressler	Inouye
Domenici	Santorum	Johnston
Frist	Shelby	Kerrey
Gorton	Smith	Lieberman
Gramm	Snowe	Moynihan
Grams	Specter	Nunn
Grassley	Stevens	Reid
Gregg	Thompson	Rockefeller
Hatch	Thurmond	Simon
Helms	Warner	

NOT VOTING (0)

Republicans (0)	Democrats (0)

EXPLANATION OF ABSENCE:
1—Official Buisiness
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

Those favoring the amendment contended:

The bill before us contains a huge new burden on State and local governments. The Feinstein/Kempthorne amendment would strike that burden. The Gorton amendment, while commendable, would fall short of eliminating it. Therefore, we urge our colleagues to support the Feinstein/Kempthorne amendment instead of the pending Gorton amendment.

The problem is with the proposed new section 254 of the Cable Act. Section 254(a) will generally prohibit State and local governments from erecting barriers to the provision of telecommunications services. For example, it will block them from giving one cable company exclusive rights to provide cable within a jurisdiction. Section 254(b) will clarify that this general authority will not extend to prohibiting State actions that may act as a barrier to providing telecommunications services but which are in furtherance of competitively neutral efforts to provide universal service, to protect the public safety and welfare, to ensure the continued quality of telecommunications services, or to safeguard the rights of consumers. Section 254(c) will clarify that this general authority will not extend to prohibiting local government actions that may act as barriers to providing telecommunications services but which are in furtherance of competitively neutral efforts to manage rights-of-way. We strongly support these three parts of section 254.

Section 254(d), though, is problematic. That section will give the FCC the right to determine if a violation or even an act inconsistent with section 254 has taken place, and to then overrule a State or local law. Two problems are created by giving the FCC the right to overturn State and local laws. First, if a State or local government wishes to challenge an FCC ruling, it will have to challenge it in the Federal district court in the District of Columbia. For cable companies and large telecommunications companies, this choice of venue will not be a problem. They already maintain offices in the District. For small governments, though, the cost of challenging an FCC ruling will be prohibitive. For example, assume that a local government has rights-of-way ordinances detailing the depth to which wires must be buried and the hours during which construction is permitted. Under section 254, a cable company could go to the FCC and claim that those limits acted as a barrier to providing telecommunications services. The FCC, though it is expert on technical matters relating to telecommunications, is not expert on local government issues, so it would likely immediately enjoin enforcement of those limits. The cable company, with its battery of lawyers in the District, would be ready for a court challenge; the city, in contrast, would likely have only one lawyer, and would not be able to afford to send that lawyer to Washington, DC, to challenge the FCC ruling.

The second problem is that when State and local governments assume the burden of challenging a decision in Washington, they will have to prove that the FCC acted unreasonably in making its ruling. Without section 254(d), any action undertaken by a State or local government contrary to section 254 would be challengeable in local Federal courts on the grounds that the State or local government acted unreasonably. The burden of proof, without section 254(d), will lie with the telecommunications providers instead of with the State and local governments.

A Gorton amendment has been offered as a compromise proposal. That amendment would give preemption under sections (a) and (b) only. The intent is to remove the burden from local governments of defending themselves in Washington for right-of-way actions. Unfortunately, the amendment has a loophole. Section (a) applies to local governments as well as State governments. Cable companies will ask for FCC rulings by claiming that local right-of-way laws are not right-of-way laws, but general barriers to providing telecommunications services. Because of this loophole we cannot support the Gorton amendment as a substitute.

So far this year Congress has been very solicitous of States' rights. State and local governments have legitimate interests that should not be overridden. It is just for Congress to demand the removal of barriers to competition in telecommunications, but it is not just for Congress to run roughshod over community concerns that are not designed to restrict competition. We therefore urge our colleagues to vote in favor of the amendment.

Those opposing the amendment contended:

Argument 1:

We sympathize with the intent of this amendment, but we contend that it is unnecessary. Sections 254(b) and (c) provide ample protections for State and local interests. Our colleagues' fear is that State and local governments will have to defend their actions frequently in Washington, DC. They need not have this fear. The types of activities that these governments will be allowed to engage in are spelled out clearly in sections (b) and (c). Further, any ambiguities that exist will soon be eliminated as the FCC begins making rulings. Standards of legitimate and illegitimate behavior will quickly be set. Cable and other telecommunications companies will not bother challenging laws if they know that the FCC will instantly, based on past experience, dismiss their claims. Therefore, we do not expect giving the FCC this authority will prove unduly burdensome.

However, not giving it this authority will prove very harmful to this bill. State and local governments have an exhaustive history of engaging in anti-competitive behavior. If two cities pass ordinances to give one phone company preferential treatment, then their ordinances should be challengeable in the same venue. If the FCC has jurisdiction, those ordinances will both end up in the Washington, DC district court. If the FCC does not have jurisdiction, though, their ordinances will be challenged in local Federal

courts instead of in the Washington, DC Federal court. With 150 district courts, we would gradually end up with 150 different sets of laws based on court rulings. Uniformity would be lost. Having telecommunications laws vary from city to city would prove to be a significant barrier to competition.

We agree that the rights of State and local governments to meet legitimate public needs must be protected. However, this bill already provides adequate protection. Therefore, we urge the defeat of this amendment.

Argument 2:

Though we must oppose the Feinstein/Kempthorne amendment, we find the arguments raised by its supporters to be compelling, especially with regard to local governments. The reason for including section 254(d) was to obtain consistency in rulings. One of the greatest things we can do to promote competition in the telecommunications industry is to make everyone abide by the same rules. At the same time, though, we agree that the discretion that will be given to the FCC in section (d) is too great, and we agree that local governments cannot easily bear the expense of defending actions related to their rights-of-way jurisdiction. Accordingly, we have offered the Gorton amendment, which we hope our colleagues will accept in lieu of the Feinstein/Kempthorne amendment. The Gorton amendment would require a higher burden of proof before the FCC could overturn a State law, and it would remove FCC jurisdiction entirely from local government right-of-way determinations. We trust this compromise position will be preferable to most of our colleagues.